

Claimant alleges he injured his right arm and shoulder on October 13, 2004, while lifting heavy windows at work. In the February 6, 2006, Award, Judge Hursh determined claimant was entitled to receive permanent disability benefits for a 4.5 percent functional impairment to his right upper extremity for his alleged shoulder injury. The Judge rejected the functional impairment rating claimant offered regarding his alleged cubital tunnel syndrome.

Claimant contends Judge Hursh erred. Claimant argues the Board should dismiss Dr. Kevin D. Komes' finding that claimant sustained no functional impairment and, instead, award him disability benefits for the 15 percent right upper extremity impairment that Dr. Edward J. Prostic found.

Conversely, respondent and its insurance carrier request the Board to deny claimant's request for workers compensation benefits. They argue claimant injured his shoulder at home lifting a doghouse. In the alternative, respondent and its insurance carrier argue that claimant, as determined by Dr. Komes, has sustained no permanent injury or permanent impairment as a result of his alleged work-related injury.

The only issues before the Board on this appeal are:

1. Did claimant injure his right upper extremity working for respondent?
2. If so, what permanent impairment did he sustain as a result of that injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds:

In October 2004, claimant was working for respondent in its shipping department. Claimant's job entailed loading 300-pound windows onto trucks. According to claimant, due to the manner the windows were being placed on carts, he and a co-worker had to pick up and flip the heavy windows to load them properly on the trucks. After approximately a week of flipping the heavy windows, claimant's right shoulder began hurting. Claimant selected October 13, 2004, as the date of accident as that is when he believes he experienced the most pain in his right arm. It is also the date he believes he told his supervisor, Roger Miller, that he hurt his arm lifting the windows.¹

Despite allegedly having a poor memory caused by his medications for seizures, at his February 2005 deposition claimant gave quite a detailed history surrounding his alleged upper extremity injury. Claimant testified he worked on October 14, 2004, and again told Mr. Miller his shoulder hurt from "[t]wisting those windows."² According to claimant, the next day he went to the safety manager, Russell Horn, and reported he had hurt his

¹ R.H. Trans. at 20; *Id.*, Resp. Ex. 1 at 22-25.

² R.H. Trans., Resp. Ex. 1 at 29.

shoulder “twisting those windows.”³ Claimant testified that on Friday, October 15, 2004, Mr. Horn gave him an elbow brace and also told him to go to the doctor on Monday if his shoulder did not stop hurting. On Sunday, October 17, 2004, claimant telephoned Mr. Miller and advised he would not be at work the next day as he was going to see a doctor.

Claimant saw Dr. Sara Ragsdale on Monday, October 18, 2004, and was restricted from lifting more than five pounds with his right arm and from lifting his right arm over his head. According to claimant, he told the doctor he injured his shoulder “at work picking up a window that they called a doghouse.”⁴ (The medical records from that doctor’s visit were not introduced into evidence.) When claimant presented his medical restrictions to respondent, he was assigned light duty work.

On October 19, 2004, claimant had an MRI (magnetic resonance imaging) study of his right shoulder. The radiologist’s report noted claimant hurt his shoulder lifting a doghouse. But the report also referenced claimant’s heavy lifting at work.

The patient hurt shoulder during the week of 10-11-04 lifting a dog house. The patient went to work where he lifts heavy objects and the right shoulder began hurting even worse. He has limited range of motion.⁵

Claimant explained he called certain window units “doghouses” as he thought they looked similar to a doghouse and he thought his fellow workers also called them doghouses.⁶ Moreover, claimant specifically denies he hurt his shoulder at home lifting a doghouse as his dog has a camper shell that weighs several hundred pounds. And claimant denies trying to lift that camper shell.

In November 2004, respondent terminated claimant for allegedly violating respondent’s attendance policy. But claimant disputes that he accumulated the requisite number of demerits to warrant his termination. Claimant, who has seizures and consequently receives Social Security benefits, has not worked since leaving respondent’s employment.

³ *Id.*, Resp. Ex. 1 at 30.

⁴ *Id.*, Resp. Ex. 1 at 51.

⁵ P.H. Trans., Cl. Ex. 1.

⁶ *Id.* at 10.

Contrary to claimant's testimony, both Mr. Miller and Mr. Horn dispute that claimant initially reported he injured his shoulder lifting the heavy windows at work. But the most damaging testimony comes from claimant's co-worker and friend, Jim Shadden. Mr. Shadden, who worked alongside claimant in respondent's shipping department, testified that claimant initially said he had injured his arm at home moving a doghouse.⁷ Moreover, Mr. Shadden also stated that claimant had asked him "to testify that he [claimant] got hurt in the trailer unloading windows."⁸ But Mr. Shadden refused as he believed that history of injury was untrue.

Contrary to claimant's alleged belief, before claimant's alleged work-related injury Mr. Shadden, Mr. Miller and Mr. Horn have *never* heard anyone refer to the windows in question as doghouses. And, more importantly, Mr. Shadden had *never* heard claimant refer to them by that name before his alleged work-related accident.

Mr. Miller testified that on approximately October 13 or 14, 2004, claimant reported his right arm was hurting and that it was beginning to bother him lifting the heavy windows. But, according to Mr. Miller, claimant denied hurting his arm at work. In addition, Mr. Horn testified that claimant specifically denied hurting himself at work. Both Mr. Miller and Mr. Horn testified they did not learn that claimant was alleging that he had injured himself at work until after he had undergone the MRI and then reported that his mother had told him to claim his injury as being work-related.

According to Mr. Horn, claimant later explained why he had changed his explanation of how his injury occurred – claimant did not want to see anybody get into trouble or lose any bonus. But that made no sense to Mr. Horn as there would have been no repercussions had claimant initially claimed a work-related injury.

Both Mr. Miller and Mr. Horn believed claimant obtained the elbow brace mentioned above at least a week or so before October 13, 2004. In addition, Mr. Miller, who was readily aware of the heavy weights his workers regularly handled on the dock, believed that claimant's work was capable of aggravating any arm or shoulder problem that claimant may have had. But neither Mr. Miller nor Mr. Horn realized that a workers compensation claim could be based upon aggravating a preexisting condition.

Claimant's attorney requested orthopedic surgeon Dr. Edward J. Prostic to evaluate claimant for purposes of this claim. Dr. Prostic, who examined claimant in both December 2004 and June 2005, diagnosed claimant as having rotator cuff tendinitis and cubital tunnel

⁷ *Id.* at 28.

⁸ *Id.* at 32.

syndrome, which the doctor rated as comprising a 15 percent functional impairment to the right upper extremity. The doctor also concluded claimant's injuries developed from repetitive trauma that he sustained at work through October 20, 2004. In formulating his rating, the doctor attempted to use the fourth edition of the *AMA Guides*,⁹ although the *AMA Guides* (4th ed.) does not specifically address impairment to the rotator cuff. Consequently, in order to rate the weakness of external rotation in claimant's shoulder the doctor utilized a table in the *Guides* that actually pertained to peripheral nerve injuries, which the doctor believed produced a similar effect.

In short, Dr. Prostic concluded claimant's right shoulder impairment comprised eight or nine percent of his 15 percent upper extremity rating with the remainder attributed to the cubital tunnel syndrome he diagnosed.

On the other hand, physical medicine and rehabilitation physician Dr. Kevin D. Komes saw claimant three times from March through May 2005 and found that claimant had limited right shoulder flexion and abduction, which the doctor believed was due to lack of full effort or self-limiting behavior. Consequently, the doctor concluded claimant had no functional impairment and required no work restrictions. And Dr. Komes dismissed Dr. Prostic's diagnosis of cubital tunnel syndrome as Dr. Komes did not believe there was any history of trauma to claimant's right elbow or hand that would indicate a possible irritation to the ulnar nerve.¹⁰

The Board is not persuaded by Dr. Komes' opinions as it appears his treatment recommendations were not intended to treat or relieve the effects of claimant's alleged injuries but, instead, to assist respondent's insurance carrier in "managing" this claim. The doctor testified, in pertinent part:

Q. (Mr. Phalen) . . . you diagnosed that he [claimant] needed treatment, correct?

A. (Dr. Komes) No. I had recommended he go to physical therapy for documentation purposes.¹¹

. . . .

Q. (Mr. Phalen) The instruction to the physical therapist was to attempt to increase his range of motion. That's because his range of motion was abnormal?

⁹ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

¹⁰ Komes Depo. at 15.

¹¹ *Id.* at 37.

A. (Dr. Komes) No, that's because they needed documentation of range of motion whether there was consistent effort or whether it could be improved through -- whether it could be documented that it was improved.

Q. So you weren't providing this physical therapy to make him better, you were providing this physical therapy to document that he wasn't hurt for the insurance company?

Ms. Dotson: Objection, argumentative.

A. The -- in my opinion there were no objective findings that he had a problem.¹²

. . . .

Q. (Mr. Phalen) Was he hurt -- and he needed the physical therapy to get better, or were you providing physical therapy to document to the insurance company that he wasn't, which one was it?

Ms. Dotson: Same objection.

A. (Dr. Komes) The purpose for the physical therapy was to provide management of the workers' compensation claim.¹³

Moreover, Dr. Komes claims great success in treating workers compensation patients and releasing them without restrictions and with zero percent functional impairment ratings to close their workers compensation claims.

Q. (Mr. Phalen) 95 percent of the time your patients receive a zero-percent impairment rating; is that correct?

A. (Dr. Komes) All of the workers' compensation patients I treat improve and are released without restrictions, receive a zero-percent impairment rating to close the workers' compensation claim.

Q. And you have been testifying to that fact at least as far back, and I want to show you the deposition of a Mark Block versus Pressure Cast Products case, April 18th, 2000. In that case I asked you, Doctor, and just read along with me if you would, Doctor. Doctor, you testified on previous occasions that 90 percent of the time you give a zero-percent impairment rating; is that correct? And your response then was 90 percent of my patients do not require an impairment rating, that's correct.

¹² *Id.* at 40.

¹³ *Id.* at 41.

Ms. Dotson: Objection.

Q. (Mr. Phalen) And still is today?

A. That's been explained previously, correct.¹⁴

Finally, the record fails to establish whether Dr. Komes' zero percent rating is supported by the *AMA Guides* (4th ed.), although it could be argued the *Guides* would have produced a zero percent functional impairment rating based upon the doctor's lack of objective findings.

In short, Dr. Komes' testimony is not credible.

The Board concludes claimant has failed to establish that his present right upper extremity injuries are the result of an accidental injury that occurred at work. The Board is not persuaded that claimant was entirely honest in explaining how he called the windows at work "doghouses" when his co-workers had not heard him use that moniker. Moreover, the evidence that claimant initially denied hurting his shoulder at work and that he told a co-worker that he had hurt his shoulder at home further weakens the claim. Accordingly, claimant's request for workers compensation benefits should be denied.

AWARD

WHEREFORE, the Board reverses the February 6, 2006, Award and denies claimant's request for workers compensation benefits.

The Board adopts the order assessing the administrative costs as set forth in the Award.

The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536 requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the Judge for approval.

IT IS SO ORDERED.

¹⁴ *Id.* at 59-60.

Dated this ____ day of June, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Elizabeth Reid Dotson, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director